IN THE

Supreme Court of The United States

OCTOBER TERM, 1978

No. 78-838

HOSPITAL AND INSTITUTIONAL WORKERS LOCAL 250, AFL-CIO,

Petitioner,

v.

MERCY HOSPITALS OF SACRAMENTO, INC. AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief In Opposition for Respondent, Mercy Hospitals of Sacramento, Inc.

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Respondent, the Mercy Hospitals of Sacramento, Inc. (hereinafter referred to as "the Hospital") submits the following brief in opposition to the Petition for Writ of Certiorari filed by Hospital and Institutional Workers Local 250, AFL-CIO (hereinafter referred to as "Local 250").

QUESTIONS PRESENTED

A. Does the petition for a writ of certiorari present an important question of federal law upon which there are conflicting decisions by the Courts of Appeals?

B. Where the rules and regulations of the National Labor Relations Board provide that reconsideration procedures are permissive and need not be utilized to exhaust administrative remedies, must an employer still move for reconsideration in a representation case to preserve judicial review under 29 U.S.C. § 160(e)?

RULES AND REGULATIONS INVOLVED

The National Labor Relations Board's (hereafter referred to as the "Board") rule and regulation, 29 C.F.R. § 102.65(e)(1), cited by Local 250, states in part:

> "A party to a proceeding *may*, because of extraordinary circumstances, . . . move after the decision for reconsideration or rehearing. . . ." (Emphasis added.)

29 C.F.R. § 102.65(e)(3), not cited by Local 250, provides in part:

> "*. . . A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.*" (Emphasis added.)

STATEMENT OF THE CASE

1. The Initial Representation Proceedings

In August of 1974, Local 250 filed four petitions for representation elections, Case Nos. 20-RC-12299 through 12302, seeking various bargaining units at the Hospital. One of the multitude of issues raised in that proceeding was the scope of the clerical unit. At the unit hearing, however, Local 250 and the Hospital stipulated to an all-clerical unit composed of hospital clericals and business office clericals.

On December 10, 1974, the Regional Director of Region 20 of the Board (hereinafter referred to as the "Regional Director") issued a Decision and Direction of Elections in Case Nos. 20-RC-12299 through 12302 and expressly approved the stipulated all-clerical unit which was denominated Voting Group C. On December 19, 1974, Local 250 filed a request for review of the Regional Director's decision denying certain of Local 250's contentions; however, Local 250 did not request review of the stipulated clerical unit. The Hospital did not file a request for review.

In January, 1975, the Board granted Local 250's request for review. On January 27, 1975, oral argument

was held before the Board in Washington, D.C., regarding the instant case, as well as five other representation proceedings involving health care institutions. During oral argument, counsel for the Hospital stressed "that the clerical unit in the *Mercy* case [as distinguished from the five (5) other cases before the Board that same day] was by stipulation . . ." and thus was not at issue.

Following oral argument, the Board issued its Decision on Review and Direction of Elections in *Mercy Hospitals of Sacramento, Inc.*, 217 N.L.R.B. 765 (1975). The Board overruled the clerical unit stipulation and directed an election in Voting Group C which the Board redefined as a "business office clerical unit." The Board also placed in the service and maintenance unit, Voting Group B all the hospital clericals it had removed from the all-clerical unit Voting Group C.

Following the Board's decision, Local 250 withdrew its petition for an election in the business office clerical unit, Voting Group C. On Wednesday, June 4, 1975, the election in the service and maintenance unit, Voting Group B, was conducted. Of those voting, 359 cast ballots in favor of representation by Local 250 and 332 against. On June 10, 1975, the Hospital filed timely objections to the conduct of the election and to conduct affecting the results of the election regarding misleading and false propaganda disseminated by Local 250 on the eve of the election. On August 19, 1975, the Acting Regional Director rejected the Hospital's objections and certified the election results. The Hospital filed a timely request for review with the Board, which it subsequently denied.

2. The Second Clerical Unit Stipulation

Following the election on June 4, 1975, in the service, and maintenance unit, Voting Group B, Local 250 on August 29, 1975, filed a new representation petition, Case No. 20-RC-13017, seeking a bargaining unit of the business office clericals at the Hospital. At the hearing held

on October 3, 1975, the Hospital and Local 250 again stipulated to an all-clerical unit of business office and hospital clericals. Mr. Roger, Local 250's attorney of record in Case Nos. 20-RC-12299-12302, 20-RC-13017 and in this proceeding, stated:

> "The Petitioner would point out that in the original hearing [Case Nos. 20-RC-12299-12302] that was held in this case both Petitioner and the Employer stipulated, in effect, that a clerical unit was appropriate, and we are still willing to live up to that stipulation."

On October 15, 1975, the Regional Director, in Case No. 20-RC-13017, issued a Decision and Direction of Election finding the stipulated all-clerical unit barred by the decision in *Mercy Hospitals of Sacramento, Inc.*, 217 N.L.R.B. 765 (1975). The Hospital filed a request for review of the Regional Director's decision. The Board treated that request as "in effect requesting reconsideration" of the *Mercy Hospitals* decision, *see* 224 N.L.R.B. 419, 421 n. 5 (1976), and denied the request. An election was held on November 13, 1975, at which the majority of the employees voting rejected representation by Local 250.

3. The Unfair Labor Practice Proceedings

On October 28, 1975, Local 250 requested the Hospital to begin bargaining for the service and maintenance unit, Voting Group B. When the Hospital refused, Local 250 filed an unfair labor practice charge, Case No. 20-CA-10828. On December 10, 1975, the General Counsel issued a complaint alleging that the Hospital's refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5) (hereinafter referred to as the "Act"). On December 16, 1975, the Hospital answered the complaint, admitting its refusal to bargain but alleging as affirmative defenses that the Board's certification was invalid because the Board improperly overruled the parties' clerical unit

stipulation in the representation case and because of the false and misleading election propaganda by Local 250 which improperly affected the outcome of the election. On February 6, 1976, the General Counsel filed with the Board a motion for summary judgment. A notice to show cause why the motion for summary judgment should not be granted was issued by the Board on February 26, 1976, to which the Hospital responded on February 27, 1976, and reiterated in brief format the affirmative defenses raised in its answer to the unfair labor practice complaint.

On June 7, 1976, the Board issued its Decision and Order which granted the General Counsel's motion for summary judgment and found that the Hospital had unlawfully refused to bargain. 224 N.L.R.B. 419 (1976). The Board ordered the Hospital to commence bargaining. The Hospital refused to comply with the Board's order so as to secure judicial review of the Board's decision regarding the composition of the bargaining unit and the Board's overruling of the Hospital's objections to the conduct of the election. On December 6, 1976, the General Counsel for the Board filed an application with the United States Court of Appeals for the Ninth Circuit to enforce the Board's order. The Hospital filed its answer thereto on December 15, 1976. Following oral argument the Ninth Circuit Court on June 12, 1978, refused to enforce the Board's order and remanded the case to the Board.

The court below noted that the Board's practice and policy was to honor stipulations for an all-clerical unit. The court was unpersuaded by the Board's explanation of its failure to honor the all-clerical unit stipulation in the instant case, especially since the Board had, less than 60 days after the *Mercy* decision, expressly approved a similar stipulation in *Otis Hospital, Inc.*, 219 N.L.R.B. 164 (1975). Since the court below refused to enforce the Board's order on this basis, it never ruled upon the

Hospital's second basis for refusing to bargain — that Local 250's election propaganda improperly affected the outcome of the election. *N.L.R.B. v. Mercy Hospitals of Sacramento, Inc.* ____ F.2d ____, 98 L.R.R.M. 2800, 2803 (9th Cir. 1978).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. There Is No Conflict Among The Circuits With Respect To The Scope Of The Board's Reconsideration Rule In Representation Proceedings.

The crux of Local 250's petition is that the Hospital failed to move for reconsideration of the Board's decision in the underlying representation case. Local 250 argues that this failure should have been fatal to the Hospital's claim that the Board acted arbitrarily and capriciously and that the Ninth Circuit Court's decision holding that the Hospital was not required to move for reconsideration creates a conflict in the circuits.

All of the cases cited by Local 250 in its petition (*see* Pet. for Cert. at 10-13) to support its conflict claim, however, consider only unfair labor practice claims which do not involve disputes concerning a Board decision in an underlying representation proceeding. They involve the Board's reconsideration rule for unfair labor practice cases, 29 C.F.R. §§ 102.48(d)(1) and (3).

Contrariwise, the instant case involves the Board's attempt to enforce a bargaining order resulting from a representation proceeding in which the Hospital committed a technical refusal to bargain so as to obtain judicial review of the Board's decision on the clerical unit stipulation and the Board's denial of the Hospital's objections regarding false and misleading election propaganda disseminated by Local 250. Thus, this case is subject to the Board's rules and regulations 29 C.F.R. §§ 102.65(e)(1) and (3), and not 29 C.F.R. §§ 102.48 (d)(1) and (3).

In addition, in the cases cited by Local 250, the appealing party, in contrast to the instant case, failed to press its claim before the administrative law judge or the Board. Instead, the issue was raised for the first time before the court. It is undisputed here, however, that the Hospital, in its answer to the unfair labor practice complaint and in its opposition to the General Counsel's motion for summary judgment, raised and argued the Board's error with respect to the clerical unit stipulation and raised its objections to Local 250's false and misleading election propaganda.

Only one Court of Appeal, other than the Ninth Circuit Court, has considered the reconsideration issue in a representation proceeding context and that Court, the Fourth Circuit Court in *NLRB v. Annapolis Emergency Hosp. Ass'n,* 581 F.2d 524, 526 (4th Cir. 1977), reached the same conclusion as the court below. It held that a motion for reconsideration of a Board decision is *not* required in a representation case, particularly where the issue involved is a legal one and the employer raises — as did the Hospital here — the propriety of the Board's representation decision in the unfair labor practice proceedings arising out of the employer's refusal to bargain.

Thus, the only two circuit courts which have considered the reconsideration issue in a representation proceeding are not in conflict. They both hold that a motion for reconsideration is not required. Accordingly, Local 250's request for a writ of certiorari should be denied.

B. The Scope Of The Board's Reconsideration Policies Does Not Present An Important Question Of Federal Law.

Even assuming, *arguendo,* there were a conflict between the circuits in this area, the issue presented by Local 250 — the scope of the Board's reconsideration policies —

is not of sufficient import to warrant a writ of certiorari. This is demonstrated by the fact that in more than 40 years under the Act, the issue of reconsideration in either an unfair labor practice proceeding or a representation proceeding has been considered only by a handful of decisions of the Courts of Appeals. Moreover, the Board's failure to file a petition for a writ of certiorari is persuasive evidence that the issue involved is not an important federal question. Finally, the resolution of this issue is entirely within the control of the Board. It can unilaterally annul the decision of the court below, by simply amending its own rules and regulations in 29 C.F.R. § 102.65(e)(1) by changing "may . . . move" to "must . . . move", and by deleting from 29 C.F.R. § 102.65(e)(3) "need not be filed" and substituting "must be filed."

C. The Decision Below Is Correct.

Local 250 argues that the Hospital should have raised, prior to the election by a motion for reconsideration, its claim that the stipulation in the underlying representation case should have been honored. Because the Hospital did not seek such reconsideration, Local 250 claims the Hospital is foreclosed from raising the stipulation issue as a defense to its refusal to bargain. Local 250 disregards, however, and would have the Court disregard, that the Board's rules and regulations concerning a motion for reconsideration are plainly permissive and not mandatory. 29 C.F.R. § 102.65(e)(1) of the Board's rules and regulations cited by Local 250, states in part:

> "A party to a proceeding *may*, because of extraordinary circumstances, . . . move after the decision for reconsideration or rehearing . . . ." (Emphasis added.)

And, 29 C.F.R. § 102.65(e)(3), which was not cited by Local 250, provides in part:

> ". . . A motion for reconsideration or rehearing *need not be filed* to exhaust administrative remedies." (Emphasis added.)

Moreover, it was evident to the court below that a motion for reconsideration would have been a futile gesture. __ F.2d at __, 98 L.R.R.M. at 2803. The General Counsel of the Board stated to the court below that the Board's failure to honor the clerical stipulation was not a mistake of fact that could be corrected by reconsideration. He claimed that, regardless of whether a second hearing was held, the Board's decision was correct and would have been the same.

The Board's action in the second clerical unit case also demonstrates that a motion for reconsideration would have been a futile effort. In 1975 when Local 250 filed its second petition for an election in the business clerical office unit, Case No. 20-RC-13017, the Hospital pointed out the Board's arbitrary and capricious action of including the hospital clericals in the service and maintenance unit and overruling the parties' clerical unit stipulation without notice or a hearing in the instant case. The Hospital and Local 250 then again entered into the same stipulation on the unit placement of the clericals in an attempt to correct the Board's mistake. The Regional Director, however, held that the stipulated all-clerical unit was barred by the Board's prior decision in *Mercy Hospitals*. The Hospital filed with the Board a request for review of the Regional Director's decision and raised essentially the same arguments as it set forth in the then pending unfair labor practice proceeding which resulted in the decision of the court below. The Board treated this request for review as "in effect requesting reconsideration" of the *Mercy Hospitals* decision, 224 N.L.R.B. at 421 n.5, and denied the Hospital's request for review of the Regional Director's decision.

Finally, as previously noted, the only other decision of a court of appeals to consider this issue concurred with the ruling of the court below. In *NLRB v. Annapolis Emergency Hosp. Ass'n*, 561 F.2d 524 (4th Cir. 1977), the

employer contended that the Maryland Nurses Association (hereinafter referred to as "MNA") was not a labor organization due to supervisory domination. It raised the issue before the Regional Director and before the Board. However, in its brief to the Board MNA contended for the first time that it had delegated its bargaining authority to a professional chapter. The Board certified MNA on the basis of this delegation. After the election, the employer refused to bargain. The Board ordered summary judgment and filed a petition for enforcement in the Court of Appeals for the Fourth Circuit, contending that the employer's failure to raise the delegation issue by a motion for reconsideration barred it under 29 U.S.C. § 160(e) of the Act from raising the issue before the court of appeals. In denying enforcement, the court cited three reasons for holding that consideration of the delegation issue was not barred, as follows:

> "[W]e nevertheless think that § 10(e) is not a bar to our consideration of the merits of the issue because (1) its purpose was fully served, (2) the hospital sufficiently raised the issue in the administrative proceedings, and (3) in any event, the Board's error was a purely legal one, so basic in its nature that § 10(e) has no application." 561 F.2d at 526.

The same reasoning is applicable to the instant case. The purpose of the reconsideration rule was served in that the Board had an opportunity to consider the clerical unit issue as part of the unfair labor practice proceeding arising out of the Hospital's refusal to bargain. It is undisputed that the Hospital raised the issue in those administrative proceedings and, as the General Counsel admitted in oral argument, the Board's error was a legal one which could not be corrected by reconsideration.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 19, 1978